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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

NO. _____

NETTIE LEE FONTENOT, ET AL.,
Petitioners,

versus

UNIT CRANE AND SHOVEL CORPORATION, ET AL.,
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, NETTIE LEE FONTENOT, individually and in behalf of her six minor children, prays that a Writ of Certiorari issue from the Supreme Court of the United States to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on July 21, 1970.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, as yet unreported, appears as Appendix A, infra, pp. 14-15. The Opinion of the United States District Court for the Western District of Louisi-

ana, Opelousas Division, is reported in 302 F. Supp. 119 (1969).

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 21, 1970. A Petition for rehearing was timely filed, and denied on August 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

On June 9th, 1969, this Honorable Court rendered a decision in the case of *Rodrique, et al., v. Aetna Casualty and Surety Company, et al.*, 395 U.S. 352, 89 S. Ct. 1835, holding that the remedy for deaths of workers employed on artificial islands (drilling rigs) located on the Outer Continental Shelf off the Louisiana coast was under the Outer Continental Shelf Lands Act (43 U.S.C.A. 1331, et seq.) and Article 2315 of Louisiana's Civil Code, which Article is the "wrongful death" statute of Louisiana. This decision reversed the holdings of the same District Judge who decided the case at bar. This District Judge, being aware of the Rodrique case, supra, pending before this Honorable Court, and being of the opinion that his decision in the Rodrique case would be reversed, decided the case at bar under both the Death on the High Seas Act (46 U.S.C.A. 761-768) and the Laws of the State of Louisiana, particularly Civil Code Article 2315. This was done in order to prevent a remand of the case by the United States Court of Appeals for the Fifth Circuit. The Trial Judge

stated explicitly in his opinion that he was considering all issues and evidence as though the case were being tried under Civil Code Article 2315, the only award not being entered in his Judgment being that for loss of love and affection. Accordingly, the determination of the amount of damages awarded to Plaintiff for the death of their father and husband was made only in accordance with the amount allowed under the Death on the High Seas Act for pecuniary loss, *BUT* the District Court did, in its Opinion state what amount would be awarded under the provision of Louisiana Law if this Honorable Court found, as it did, in the Rodrique case, that Louisiana Law applied to wrongful death actions for death to offshore workers. The Trial Court rendered its decision and the case was appealed to the United States Court of Appeals for the Fifth Circuit. After the case was appealed this Honorable Court rendered its decision on the Rodrique case. The Court of Appeals, despite Petitioners' strong argument to the contrary, rendered a per curiam decision concluding:

> "Accordingly, we reverse the decision of the Trial Court and remand for a new trial to be conducted in accordance with the Supreme Court's Opinion in Rodrique."

The questions presented are:

1.) Whether the Court of Appeals was correct in remanding this case in its entirety when the record reflects that all issues in question were considered and ruled upon by the Trial Court; said Court specifical-

ly stating in its Opinion that the trial was being conducted under the provisions of Louisiana Civil Code Article 2315 in anticipation that said law would control.

2.) Whether the Court of Appeals was correct in remanding on the issue of liability when the record contains all of the evidence necessary to sustain the Trial Court's decision, and particularly when the Court's Opinion expressly states that this issue was being tried and considered in accordance with the provisions of applicable Louisiana Law.

3.) Whether this case should have been remanded on the issue of quantum when the record discloses that the Trial Judge considered all of the evidence pertaining thereto, and actually alloted amounts which might be awarded under Louisiana Law, this being expressly done to avoid the necessity of a remand.

4.) Whether the Court of Appeals should have applied a more equitable solution and affirmed the Trial Court's decision; or, alternatively, remanding solely for an award for loss of companionship, love and affection under Civil Code Article 2315; thereby avoiding a lengthy delay in concluding this matter and great expense on the part of all litigants.

STATEMENT OF THE CASE

This is a suit instituted by NETTIE LEE FONTENOT, widow of Lanson Soileau individually and in behalf of her six minor children, for damages sustained by the wrongful death of her husband who was killed

on January 17, 1966, while operating a crane on an offshore drilling platform located about sixty (60) miles below Morgan City, Louisiana, in the Gulf of Mexico. The right hook roller of the crane broke as the deceased was lifting a load of drill pipe from a vessel onto the platform. The Defendant, UNIT CRANE AND SHOVEL CORPORATION, was the manufacturer of the crane, and the Trial Court held Defendant liable, finding that the design of the link of the crane or of the hook roller assembly of the crane was defective or improper. The Trial Court found the Defendant liable to all Plaintiffs for their damages under the Maritime Law, Death on the High Seas Act or Louisiana Civil Code Article 2315. The Trial Court made an award for pecuniary losses to the widow and six children in the amount of One Hundred Thirty-three Thousand Three Hundred and No/100 ($133,300.00) Dollars, holding that under the Death on the High Seas Act only pecuniary losses are recoverable. Under Louisiana law all damages, both pecuniary and otherwise are recoverable. In discussing the award for damages allowable under Louisiana law the Trial Court held that Plaintiff, MRS. SOILEAU, was entitled (in addition to the award for pecuniary damages) the sum of Forty Thousand and No/100 ($40,000.00) Dollars for the loss of love, affection, and companionship, and that each of the six children were entitled to an additional Ten Thousand and No/100 ($10,000.00) Dollars for the loss of their father. The Trial Court stated that it would not enter Judgment for loss of companionship, love and affection, because at that time the Rodrique case was still pending before this Honorable Court. The Trial Judge specifically stated, however, that he would make the above stated

awards under the evidence presented if Civil Code Article 2315 was found applicable. Both plaintiff and Defendant appealed to the United States Court of Appeals for the Fifth Circuit. Following the appeal, but before the decision by the Court of Appeal, this Honorable Court on June 9, 1969, rendered its decision in the Rodrique case.

The Fifth Circuit Court of Appeal, on July 21, 1970, rendered a per curiam decision in which it stated:

> "After the trial and before this appeal, the United States Supreme Court rendered its opinion in Rodrique v. Aetna Casualty and Surety Co. . . . . reversing this Circuit and holding that the Outer Continental Shelf Lands Act . . . . . governs all claims arising out of accidents of this sort on such offshore platforms . . . . . it appears therefore that Louisiana Law as provided in the Outer Continental Shelf Lands Act rather than the law provided in the Death on the High Seas Act should have been applied to the claims asserted in this case. Accordingly, we reverse the decision of the Trial Court and remand for a new trial to be conducted in accordance with the Supreme Court's Opinion in Rodrique."

The first question that the above language presents is what is in "accordance with the Supreme Court's opinion in Rodrique"? This language simply means that the case must be conducted under Louisiana Law, which is Article 2315 of Louisiana's Civil Code. Now

let us examine exactly what the Trial Court did in this case.

THE LEARNED TRIAL COURT, ANTICIPATING A REVERSAL OF THE RODRIQUE CASE, AND IN ORDER TO PREVENT A REMAND, *TRIED THE CASE UNDER THE LAWS OF THE STATE OF LOUISIANA*. Now what good purpose could be served by having that same Court again try the case under the same laws?

The Trial Judge's Opinion indicates explicitly that all of the elements required under Louisiana Civil Code Article 2315 were considered in finding liability.

At Page 1100 of the transcript the Trial Judge stated the following:

> "Trial proceeded under the Death on the High Seas Act, 46 U.S.C.A., Sec. 761, et seq., *and Article 2315 of the Louisiana Civil Code*, which is the wrongful death statute of this State." (emphasis provided).

To further emphasize that he was basing his finding of negligence under Article 2315, Judge Putnam stated the following in his opinion, at Page 1101 of the transcript, to-wit:

> "Prior to the trial the Soileau claims under Article 2315 of the Louisiana Civil Code were dismissed, following the decision in *Dore v. The Link Belt Company*, 391 F. 2d 671 (5 Cir.

> 1968), and *Rodrique v. Aetna Casualty and Surety Co.*, 395 F. 2d 216 (5 Cir. 1968). Since Writs were issued by the Supreme Court in these cases, ____; U.S. ____, these demands *to avoid the necessity of an additional trial in the event they are overruled. . . .*"

In the very words of the Trial Court, therefore, this case was being tried under Louisiana Civil Code Article 2315 as well as the Death on the High Seas Act.

All of the same elements of liability required by both statutes were considered by the Trial Court. This is made very evident by the Court's determination that there was no contributory negligence shown on the part of Plaintiffs, as stated in the opinion (Tr. p. 1104-1105), as follows:

> "Placing the cart before the horse, we must reject Unit's contention that its machine was subjected to a gross overload at time of failure, and with it the affirmative defense of contributory negligence."

Certainly, products liability, which was the basis for the Trial Court's decision, is just as applicable under Article 2315 as under Death on the High Seas Act, as stated by the Court as follows (Tr. p. 1117):

> "Unit, therefore, would be liable to all Plaintiffs for their damages under the maritime law, Death in the High Seas Act, or Article 2315 of the Louisiana Civil Code, the sole difference

> being in the measure of damages for the wrongful death of Mr. Soileau to be recovered by his survivors, under the facts of this case."

This concept was stated earlier in the Court's opinion as follows (Tr. p. 1109):

> "However, in view which we take of this case it would make no difference in the outcome if we apply the Death on the High Seas Act or Article 2315 of the Louisiana Civil Code, except in the measure of damages recoverable for Mr. Soileau's death . . ."

It is respectfully submitted that all issues were decided with finality by the Trial Court, including loss of companionship, love and affection under Article 2315, the Trial Court stating at page 1120 of the transcript:

> "We next direct our attention to the claims of Mrs. Soileau and her children for damages allowable under Article 2315 of the Louisiana Civil Code.

Following this language the Trial Court states exactly what amount of damages it would award Plaintiffs under Louisiana Law. *To order an entire new trial on issues which have been determined by the Trial Court in accordance with the correct principles of law would appear to serve no purpose except to merely allow the Defendants a second chance at avoiding liability.* All of the elements of liability were considered

in the original trial and the Defendant has not shown that it has been prejudiced in any manner. Defendant now insists on all issues being retried under Article 2315, when the Trial Court explicitly states that said Article was actually applied in determining liability. Justice was well served on this particular issue, and it would be a travesty of justice to duplicate the extremely expensive procedure of a new trial. The record contains the testimony of the numerous witnesses brought at great expense from all parts of the country by both Plaintiffs and Defendant.

To compel the Plaintiff to wait another four to five years before the ultimate decision in this case is most unjust. This is exactly what the Trial Court attempted to prevent.

It is respectfully submitted that the Court of Appeals had the duty, power and authority to modify the Judgment of the lower Court without the necessity of remand under the provisions of 23 U.S.C.A. 2106, which provides as follows:

> "The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a Court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Under the cited statute the Court of Appeals could have affirmed the Trial Court's *decision*, but modify the Trial Court's *judgment* by allowing Plaintiffs damages under the Louisiana Law in the amounts as determined by the Trial Court in its *decision*. This would be following the intent of the Trial Court, who carefully set forth his findings on all issues specifically considering the possibility of Article 2315 being Plaintiff's exclusive remedy.

This is the type of litigation that Justice Tuttle had in mind when he wrote in *Blaney v. Florida National Bank at Orlando*, 357 F. 2d 28, at Page 28:

> "However, in the interest of economy of judicial time and effort, this Court expressly declines to remand on this ground."

And in *In Re Permian Basin Area Rate Cases*, 390 U.S. 827, 88 S. Ct. 1344, at Page 1390, the Supreme Court, in a case that had been pending for almost eight years, resolved certain issues rather than remand the case to the Court of Appeal. See also *Niagara Fire Insurance Company v. Bryan Hewgley, Inc.*, 195 F. 2d 155 in which the Court of Appeal stated that it could and did modify a Trial Court Judgment rather than remand the case for a new trial.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals serves no purpose except to compel the Plaintiffs to tolerate another five or more years of financial hardship. Justice

cannot be served by remand. Why should a case be remanded to be tried in a manner in which it was tried? Why should Defendant be allowed another opportunity to delay paying its just debt? Why should Defendant be given another opportunity to rebut Plaintiff's case? The Trial Court did everything possible to prevent a remand.....it tried the case under both the Death on the High Seas Act and Article 2315 of Louisiana Civil Code. This Honorable Court has ruled that such cases must be tried under Article 2315.....this has been done. Why should it be done a second time? No further evidence could possibly assist the Trial Court render a decision. These are ample reasons for the exercise of this Court's power of supervision.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeal for the Fifth Circuit.

Respectfully submitted:

J. NILAS YOUNG
YOUNG & BURSON
ATTORNEYS AT LAW
POST OFFICE BOX 985
EUNICE, LOUISIANA 70535
COUNSEL FOR PETITIONERS

CERTIFICATE

I have this date mailed copies of this Application for Writ of Certiorari to all Counsel of Record.

Eunice, St. Landry Parish, Louisiana, October ____, 1970.

J. NILAS YOUNG
Counsel for Petitioners

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28331

NETTIE LEE FONTENOT, ET AL.,
Plaintiffs-Appellees-Cross Appellants,

versus

NICKLOS DRILLING COMPANY, ET AL.,
Defendants-Appellees,
UNIT CRANE AND SHOVEL CORPORATION,
Defendant-Appellant-Cross Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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(July 21, 1970)

Before COLEMAN, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: This case involves claims arising out of an accident on a stationary drilling platform off the coast of Louisiana. At the time of the trial this circuit followed the rule that the Death on the

High Seas Act, 46 U.S.C.A. §§ 761 et seq., governed all claims arising out of an accident on one of these platforms. *Rodrique v. Aetna Casualty and Surety Co.*, 5 Cir., 1968, 395 F.2d 217; *Dore v. Link Belt Co.*, 5 Cir. 1968, 391 F.2d 671. The trial court carefully followed this rule and permitted recovery under the terms of the Death on the High Seas Act.

After the trial and before this appeal, the United States Supreme Court rendered its opinion in *Rodrique v. Aetna Casualty and Surety Co.*, 1969, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360, reversing this circuit and holding that the Outer Continental Shelf Lands Act, 43 U.S.C.A. §§ 1331 et seq., governs all claims arising out of accidents of this sort on such offshore platforms. Under that Act federal law supplemented by the law of the adjacent state is applicable to such claims. It appears, therefore, that Louisiana law as provided in the Outer Continental Shelf Lands Act rather than the law provided in the Death on the High Seas Act should have been applied to the claims asserted in this case. Accordingly, we reverse the decision of the trial court and remand for a new trial to be conducted in accordance with the Supreme Court's opinion in *Rodrique*.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
August 12, 1970

TO ALL PARTIES LISTED BELOW

Re: No. 28331 - Fontenot, et al vs. Nicklos Drilling Co.

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
(Signed) PAT QUARTARARO
Deputy Clerk

/paq
cc: Mr. Boris F. Navratil
Mr. Jacques B. Pucheu
Mr. J. Winston Ardoin
Mr. Sam A. LeBlanc, III

APPENDIX B

JUDGMENT

(Title Omitted)

No. 12,064

This action having been duly tried before the Court without jury, and the Court having considered the pleadings and evidence presented on trial, together with briefs and arguments of counsel for the parties, and having made findings of fact and conclusions of law set forth in the written Opinion handed down and filed by the Court on March 28, 1969, it is hereby:

ORDERED, ADJUDGED AND DECREED that plaintiff, Nettie Lee Fontenot Soileau, individually and as natural tutrix of her minor children, have and recover against the defendant, Unit Crane and Shovel Corporation, for pecuniary losses sustained by her and her minor children as a result of the death of Lanson Soileau, in the following sums:

Mrs. Nettie Lee Fontenot Soileau	$ 30,218.44
Donald Ray Soileau	10,084.00
James Randall Soileau	10,646.50
Romona Soileau	11,187.40
Cynthia Soileau	11,706.70
Patrick Soileau	12,686.80
Charles Soileau	14,431.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that third-party plaintiff, Nicklos Drilling Company, have and recover from defendant, Unit Crane

and Shovel Corporation, the sum of FORTY THOUSAND ONE HUNDRED FOUR & NO/100 ($40,104.00) DOLLARS.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff's claims against defendant, Union Oil Company, be and they are hereby rejected, and that the plaintiff's claims as to this defendant are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that defendant shall pay prejudgment interest in the amount of five per cent (5%) per annum on the award of damages hereinabove rendered running from the date of the loss, January 17, 1966, until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claims of plaintiff, Nettie Lee Fontenot Soileau, individually and in her representative capacity, for damages pursuant to the Louisiana Wrongful Death Statute, LSA-Revised Civil Code, Article 2315, are hereby reserved pending the outcome of the Supreme Court decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 F. 2d 616 (5 Cir. 1968), and *Dore v. The Link Belt Company*, 391 F. 2d 671 (5 Cir. 1968), *writs issued*, ____ U.S. ____, 89 S. Ct. 295, 21 L. Ed. 2d 268 (1968).

Lafayette, Louisiana, this 1st day of May, 1969.

/s/ R. J. Putnam
United States District Judge

Filed
May 1, 1969

SUPREME COURT, U.S.
FILED
FEB 1971
E. ROBERT SEAVER, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

~~795~~

No. 796

NETTIE LEE FONTENOT, ET AL
NICKLOS DRILLING COMPANY,
Applicants

Versus

UNIT CRANE AND SHOVEL CORPORATION,
Respondent

RESPONSE OF UNIT CRANE AND SHOVEL CORPORATION TO THE PETITION FOR A WRIT OF CERTIORARI FILED BY NETTIE LEE FONTENOT, ET AL AND NICKLOS DRILLING COMPANY

BORIS F. NAVRATIL, of
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Counsel for Respondent, Unit Crane
and Shovel Corporation

ORTLIEB PRESS — BATON ROUGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

NETTIE LEE FONTENOT, ET AL
NICKLOS DRILLING COMPANY,
Applicants

Versus

UNIT CRANE AND SHOVEL CORPORATION,
Respondent

RESPONSE OF UNIT CRANE AND SHOVEL CORPORATION TO THE PETITION FOR A WRIT OF CERTIORARI FILED BY NETTIE LEE FONTENOT, ET AL AND NICKLOS DRILLING COMPANY

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

We agree with the applicants that the writs they seek should be granted so that the question could authoritatively be settled whether the *Rodrigue*[1] decision should be applied retroactively or prospectively only. Uncertainty concerning this has already led to two conflicting decisions and others are bound to follow.

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[1] Rodrigue v. Aetna Casualty & Surety Company, 1969, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360.

In *Guillory v. Humble Oil & Refining Co.*, 310 F. Supp. 230 (E.D. La. 1970), a Louisiana District Court, without discussion of the problem, applied *Rodrigue* retroactively and held that plaintiff's suit was barred by the one-year prescriptive period established by Louisiana Civil Code Article 3536. The suit was filed on January 15, 1968, a little over two years after the cause of action arose. Under the then existing law, it was filed timely. Indeed, *Rodrigue*, which did not come until a year and one-half later (June 6, 1969), was not even a gleam in Your Honors' eyes at that time. Still, there was no doubt in the district judge's mind that by ruling out the applicability of maritime law, *Rodrigue* also ruled out the maritime doctrine of laches. Granted that the rules governing limitations of actions are procedural and that even under *Rodrigue* the Court was free to apply a federal procedural law governing prescription: There is no such generally applicable federal law—the Court concluded—therefore, the prescriptive provisions would have to come from the same source as the cause of action itself, namely, state law.

In opposition to *Guillory*, the Fifth Circuit Court of Appeals recently held that the maritime doctrine of laches would be applied in a fixed-platform injury suit arising and tried prior to *Rodrigue*. *Huson v. Otis Engineering Corporation*, 430 F.2d 27. But the Court did not reach this result on the basis that *Rodrigue* was non-retroactive, otherwise it would have simply said that the action was commenced timely under *Snipes*.[1] No—the Court went to great pains to explain why laches should apply despite *Rodrigue*. This can lead to no other conclusion than that, despite all protestations to the contrary, the Court was in effect applying *Rodrigue* retroactively. It reasoned that *Rodrigue* commands only the adoption of state substantive law and not such procedural law as Article 3536 of the Louisiana Civil Code which establishes a

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[1] Pure Oil Company v. Snipes, (CA-5, 1961) 293 F.2d 60.

one year prescription for tort actions; that, therefore, despite *Rodrigue*, it was free to apply the law of the forum, i. e., federal law, on a procedural matter such as prescription. But what federal procedural law of prescription is there with respect to a cause of action which is not created by specific federal substantive law? Unlike Judge West in the *Guillory* case, who concluded there was no such law and that the law which generates the cause of action, i.e., state law, must also govern prescription, *Huson* reverts to federal martime law—a result which appears quite in the teeth of *Rodrigue*. Assuming the retroactivity of *Rodrigue*, *Guillory* would appear to be the more valid of the two decisions.

(We might observe, parenthetically, that *Huson* appears to base its favoritism toward the doctrine of laches, as against state prescriptive laws, on the "strong federal surge toward uniformity." The argument of uniformity is less than overwhelming when one considers the "jack-up" platforms which are also used extensively in the Gulf. Working conditions on these platforms do not differ one iota from those on stationary platforms. However, due to the fact that they may occasionally be floated and moved by water, these platforms have been federally characterized as vessels. For a single wrongful death action arising on such a platform the "surge toward uniformity" has established no less than three distinct prescriptive periods: two years under the Death on the High Seas Act (46 USC 761-68); three years under the Jones Act (46 USC 688); and laches under the maritime law. At the same time, *Huson* recognizes that a wrongful death action arising on a fixed platform may henceforth have to be subjected to the *one year* peremption period which is the adjunct of the Louisiana Wrongful Death Statute, Civil Code Article 2315. Quo Vadis, uniformity?)

The question remains: Should *Rodrigue* be applied retroactively? From purely equitable considerations, we would have to agree with applicants that it probably should not. We recognize, however, that there are precedents for either position, equities notwithstanding. This seems apparent from the recent decision rendered by this Court in *United States v. Estate of Donnelly*, 1970, 397 U.S. 286, 90 S.Ct. 1033. The question before the Court was whether it should apply retroactively its own prior decision which changed the law respecting the mode of filing federal tax liens. Retroactivity would have burdened with a tax lien property acquired by innocent purchasers at a time when the established law permitted them to acquire it without a tax lien. The equities against retroactivity were just as strong as in *Chicot County Drainage District v. Baxter State Bank*, 1940, 308 U.S. 371, 60 S.Ct. 317, 87 L.Ed. 329. However, only three dissenters chose to follow *Chicot*, while the majority voted in favor of retroactivity. See also: Anno.: Prospective or Retrospective Operation of Overruling Decisions, 10 ALR3d 1371; and *United States v. Kelly*, 314 F. Supp. 505, (E.D. N.Y. 1970) which catalogs innumerable cases dealing with the problem and neatly separates them into two groups—pro and con—each group being of apparently equal length and weight.

Beside agreeing with applicants that a writ should issue in this case, we must also, on further reflection, agree with them that *Rodrigue* should not be applied retroactively to this case. Too much reliance has been placed by the parties and the trial judge on the pre-*Rodrigue* law and the results cannot now be undone even by a remand for a new trial. To borrow this Court's language from the *Chicot* case (supra) "the past cannot always be erased by a new judicial declaration." For instance, in relying on pre-*Rodrigue* law the trial judge in this case, long before the trial on the merits, sustained a motion by one of the original defendants, Boehck Engineering

Company, and dismissed the suit against it. Boehck was the seller of the crane which fell and led to the death of Mr. Soileau which is the core of this litigation. The motion and ruling were based on the ground that the only cause of action asserted against Boehck was under provisions of the Louisiana Civil Code which makes sellers responsible for latent defects in the merchandise they sell. The Judge correctly held that plaintiffs could not avail themselves of Louisiana law since the cause of action arose in a locality subject to maritime law. There is simply no way to undo that ruling now. At the same time, is it valid to speculate that if Boehck had remained in the suit, it may have been dismissed after a trial on the merits anyway? If it decided to impose liability, may not a jury have conceivably found Boehck responsible or at least jointly responsible with Unit which would have lessened the burden of the judgment imposed on Unit?

Further relying on pre-*Rodrigue* law, the trial judge, on his own motion, during a pre-trial conference held approximately three weeks prior to trial on the merits, (and about two weeks before this Honorable Court granted writs in *Rodrigue*) struck Mrs. Fontenot's demand for a jury trial. He did so on the then correct conclusion that plaintiff's only cause of action against Unit Crane and Shovel Corporation was under the provisions of the Death on the High Seas Act. Since the ruling was patently correct on the basis of established law, Unit Crane and Shovel Corporation did not take issue with it and thus lost the right to have the case tried by a jury to which it is presumably entitled under the *Rodrigue* holding. The loss of a jury trial could, of course, be remedied by a remand for a new trial. This is the *only* way, however, it could be remedied. We totally disagree with applicants in their argument that even if this Court should hold that *Rodrigue* is to be applied retroactively to this case, a re-trial is unnecessary because the trial judge has already considered all con-

ceivably applicable laws while trying the case and made his findings with reference thereto. This facile argument assumes that the jury would, of necessity, be compelled to make the same findings. A glance at the complex factual issues inherent in the evidence adduced in the trial of this case makes such an assumption patently untenable.

Frankly, we have never heard of a case in which the trial judge reserved plaintiff's rights to proceed not only on the basis of existing laws (which the judge is sworn to administer) but on the basis of some future law, which the judge thinks ought to, but which may or may not, come to pass. (After all, this Court in *Rodrigue* could conceivably have affirmed the *Snipes* line of jurisprudence which had been followed in the Fifth Circuit for some ten years; as it recently upheld another creature of the Fifth Circuit—the doctrine of operational negligence). We submit that such practice should be viewed with disfavor and strongly discouraged.

Finally, while wearing the established-law hat (as against the speculative-law hat), the trial judge agreed that the general maritime law which applied to plaintiffs' causes of action (it applied to the death claim through DOHSA) did not contain any doctrines of strict liability with respect to product failures, such as are found in the laws of many states. To remedy this situation, the judge adopted as new substantive maritime law Sections 400 and 402(a) of the *Restatement of the Law of Torts* and predicated Unit's liability to plaintiffs on this newly-minted substantive maritime law. To our argument, that a re-trial is necessary if retroactivity is ordained, we add the proposal that the *Restatement* does not correctly reflect the Louisiana law respecting manufacturers' liability and that a jury instructed pursuant to applicable Louisiana law may well make different findings from those made by the trial judge on the basis of the *Restatement*.

In the alternative that this Court should hold that the *Rodrigue* decision is not to be applied retroactively, the following additional questions present themselves for review: Is there any substantive maritime law of strict products liability such as that set forth in Sections 400 and 402(a) of the *Restatement of the Law of Torts*? If there is no such law at present, may it—deus-ex-machina-fashion—be established by a federal district Judge sitting in admiralty? If it may be, should it be? In brief, the case poses for resolution the problem so skillfully outlined by Judge Layton in *Noel v. United Aircraft Corporation*, 204 F. Supp. 929 (1962):

> "* * * * Thus, in spite of the fact that they cannot advance some of the strongest reasons for expansion of implied warranty liability, Libellants are asking this Court to extend it into areas not yet reached by the highest Court of any state.
>
> "Finally, introduction of implied warranty of fitness into admiralty would not harmonize with existing admiralty policy. Confusion would be created as to the relationship of implied warranty of fitness to the existing admiralty doctrine of unseaworthiness. If unseaworthiness and implied warranty of fitness are the same, the Court has already explained why Supreme Court limitations on the scope of unseaworthiness bar extension of either doctrine in admiralty to embrace manufacturers and passengers. However, if implied warranty of fitness is deemed to be different from unseaworthiness, its introduction into admiralty should be accompanied by careful definition of its boundaries, to avoid confusion with unseaworthiness. The Court has tried and failed to find any meaningful distinctions between the two doctrines. There is no substantial difference between the implied warranty that a propeller is fit and the implied warranty that a propellor is seaworthy (or airworthy). The only important

> difference lies in the classes of persons owing the duty, and the class of persons protected. If the doctrine of unseaworthiness is to be expanded by calling it 'implied warranty of fitness,' that expansion should be made by Congress or the Supreme Court, not here.
>
> "The Court concludes that implied warranty of fitness should not be incorporated into the general maritime law at this time."

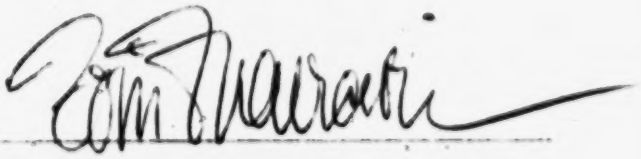
In this connection it may also be well to recall that the occurrence of a tort on navigable waters is but one of the bases for admiralty jurisdiction:

> "The basis for admiralty jurisdiction must be a combination of a maritime wrong and a maritime location. In addition to the requirement of locality, there is a continuing undercurrent which requires that the controversy have a maritime nexus. The tort must arise from a maritime transaction, or be of a maritime nature, or deal with a maritime subject."
> *McGuire v. City of New York*, (S.D. N.Y. 1961) 192 F. Supp. 866.
>
> See also: *Atlantic Transport Company v. Embrovek*, 1914, 234 U.S. 52, 34 S.Ct. 733, 58 L.Ed. 1208.

Succinctly stated, admiralty does not and should not concern itself with non-maritime affairs. That conclusion has been recognized and underscored by this Court in the *Rodrigue* decision itself, when it refused to expand admiralty jurisdiction over the offshore stationary drilling platforms, because they are essentially non-maritime. Should not the same restraint be applied by an admiralty court when it comes to the determination of a land-based manufacturer's liability for products which may, at best, have only casual connection with the water?

In the ultimate alternative that this Court should decree that this case remain under pre-*Rodrigue* law and should further endorse the amplification of existing substantive maritime law by Sections 400 and 402(a) of the *Restatement*, we believe that the decision holding Unit Crane liable to plaintiffs is based on erroneous conclusions of fact. These conclusions were not examined by the Court of Appeals in view of its decision to remand the case for a new trial. In an admiralty proceeding, Unit was entitled to have them examined as fully as if the case had been tried, de novo, before the appellate tribunal. *New Orleans Stevedoring Co. v. North Atlantic & Gulf SS Co.*, (CA-5, 1954) 213 F.2d 859.

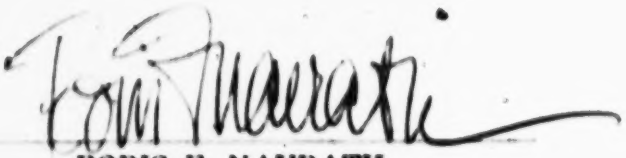
In view of the above, we believe that a writ of certiorari should issue herein; that the decision of this Court in *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352 should be declared to have prospective operation only; that the decision of the trial court should be reversed on the law (there being no maritime law of manufacturer's strict liability for product failures and Unit having been found free of negligence); alternatively, the decision of the trial could should be reversed on the facts which show that the crane in question was adequate and fell due to a gross overload, not any inherent defects; alternatively, the decision of the Fifth Circuit Court of Appeals should be affirmed.



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CERTIFICATE

In observance of the Rules, I have served three copies of the above and foregoing response on behalf of Unit Crane and Shovel Corporation upon all parties, by prepaid mail addressed to their counsel, this 5th day of February, 1971.



BORIS F. NAVRATIL